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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/053,266	01/17/2002	Ernst Heinz	VOS-29	1286
1473	7590	09/19/2007	EXAMINER	
ROPE & GRAY LLP PATENT DOCKETING 39/361 1211 AVENUE OF THE AMERICAS NEW YORK, NY 10036-8704			MCELWAIN, ELIZABETH F	
			ART UNIT	PAPER NUMBER
			1638	
			MAIL DATE	DELIVERY MODE
			09/19/2007	PAPER

**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

## Office Action Summary

Application No.

10/053,266

Applicant(s)

HEINZ ET AL.

Examiner

Elizabeth F. McElwain

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

- 1) ☒ Responsive to communication(s) filed on 26 March 2007.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

### Disposition of Claims

- 4) ☒ Claim(s) 1 and 5-23 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☐ Claim(s) \_\_\_\_\_ is/are allowed.
- 6) ☒ Claim(s) 1 and 5-23 is/are rejected.
- 7) ☐ Claim(s) \_\_\_\_\_ is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some \* c) ☐ None of:
- ☐ Certified copies of the priority documents have been received.
  - ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
  - ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- \* See the attached detailed Office action for a list of the certified copies not received.

### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)   | 4) <input type="checkbox"/> Interview Summary (PTO-413)<br>Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948)                       | 5) <input type="checkbox"/> Notice of Informal Patent Application                       |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)<br>Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____  |

## **DETAILED ACTION**

### ***Continued Examination Under 37 CFR 1.114***

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on March 26, 2007 has been entered.
2. Claims 1 and 5-23 are pending, and are examined in the instant action.
3. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

### ***Claim Rejections - 35 USC § 112 Enablement***

4. Claims 1 and 5-23 remain rejected under 35 U.S.C. 112, first paragraph, for reasons of record set forth in the previous Office Actions, stating that while the specification is enabling for a method of generating transgenic *Linum usitatissimum* (flax) plant cells comprising introducing *Agrobacterium tumefaciens* containing a vector bearing a neomycin phosphotransferase gene which confers resistance to kanamycin and to G418 to hypocotyls segments by coculturing for 4 days, transfer of cocultured material to medium containing a combination of NAA, benzylaminopurine and kanamycin for 6 weeks followed by transferring selected

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calli or shoot material to medium containing a second antibiotic, G418 and rooting selected calli or shoots to produce a whole plant, as described in the specification at pages 20, Example 2 through page 28. Applicants' arguments filed March 26, 2007 have been fully considered, but are not deemed persuasive.

Applicants traverse the Examiner's rejection stating that the prior art cited by the Examiner taught transformation of flax cells and regenerating transgenic flax plants in a method employing only one antibiotic. Applicants also point to Ling et al and McHughen and Holm as teaching transformed flax lines (attached to response). However, the Examiner maintains that the transformation of *Linum usitatissimum* by Ling et al used plastocytes and resulted in abnormal plants and seeds that did not germinate (at page 484, the last paragraph) and that transformation varied with different genotypes (page 486, second column). In addition, the McHughen and Holm reference using particle bombardment was published after the filing date of the present application and does not teach successful production of transgenic *Linum usitatissimum* by selection with a first and second antibiotic. It is noted that there is also an abstract provided by Wijayanto and McHughen (1991). However, this abstract does not provided sufficient information to be enabling and does not teach the use of two antibiotics for selection. Applicants also argue that the specification is enabling for all of the recited antibiotics and that Ling and Binding teach use of hygromycin. The Examiner maintains that Ling and Binding did not successfully produce transformed flax as the transgenic flax was abnormal and the seeds failed to germinate, as stated above.

### ***Conclusion***

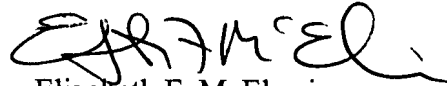
No claims are allowed.

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Any inquiry concerning this communication or earlier communications from the examiner should be directed to Elizabeth F. McElwain whose telephone number is (571) 272-0802. The examiner can normally be reached on increased flex time.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Anne Marie Grunberg can be reached on (571) 272-0975. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.



Elizabeth F. McElwain  
Primary Examiner  
Art Unit 1638

EFM